DATO' PARAM CUMARASWAMY

v.

MBf CAPITAL BHD & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
AHMAD FAIRUZ JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-323-1997]
20 OCTOBER 1997

CIVIL PROCEDURE: *Jurisdiction - High Court - Interlocutory application - Striking out writ on ground of immunity from suit - Determination of question of immunity - Whether a matter of discretion of the trial judge - Decision to postpone determination of issue at the trial of action - Whether proper - Rules of the High Court 1980, O. 12 r. 7 - Scope and effect*

CIVIL PROCEDURE: *Jurisdiction - High Court - Suit against United Nations Special Rapporteur on Independence of Judges and Lawyers - Striking out writ on ground of immunity - Question of immunity - Whether a question of fact - Decision to postpone determination of question at the trial of action - Whether within the power of the trial judge - Whether there were serious questions to be tried - Rules of the High Court 1980, O. 12 r. 7*

The appellant in this case is an advocate and solicitor. In 1994, the appellant was appointed as a United Nations Special Rapporteur for the Independence of Judges and Lawyers for a period of three years. Sometime in 1995, the appellant was interviewed by the International Commercial Litigation magazine, and in the course thereof, made some comments on the Malaysian judiciary. The comments were later published by the magazine. The respondents alleged that the appellant, by his said comments, had spoken defamatorily of them, and in the event instituted a writ action against the appellant for libel and slander.

It was not in dispute that by virtue of s. 22 of the Convention on the Privileges and Immunities of the United Nations 1946 ('the Convention') and art. 12 of the Diplomatic Priveleges (United Nations and International Court of Justice) Order 1949 ('the 1949 Order'), Special Rapporteurs such as the appellant were accorded immunity from legal process for words spoken or written by them in the course of their mission. It was also not in dispute that, pursuant to the suit, a certificate was issued by the Secretary General of the United Nations affirming, firstly, the appellant's immunity, and secondly, that the impugned words were spoken by the appellant in the course of his mission as a Special

Rapporteur. This apart, the Minister of Foreign Affairs, Malaysia, had also issued a Certificate under s. 7 of the International Organisations (Privileges and Immunities) Act 1992 ('the Act'), endorsing the appellant's status and mandate as a Special Rapporteur.

The appellant, in the circumstances, claimed that the court had no jurisdiction over his person because immunity attached to him, and in the event took out a summons under O. 12 r. 7 Rules of the High Court 1980 ('the Rules') to set aside the writ.

The respondents contended however that the appellant, in so making the statement, had acted outside his mandate and was not therefore entitled to immunity.

The learned judicial commisioner ruled: (i) that the facts as placed before her did not oust her jurisdiction; (ii) that the Certificates as issued by the Secretary-General and the Minister had no more probative value than a mere opinion, and in the event decided to disregard them; and (iii) that the appellant's immunity was a matter that was not capable of resolution in a summary manner, and so directed that that issue be determined at the trial of the action. The appellant's summons, in consequence, was dismissed.

The appellant appealed and argued before the present court: (i) that the judicial commisioner erred in law in deferring the question of immunity to the trial of the action; (ii) that even if the learned judicial commissioner had the discretion to so defer the question, on the facts, she ought not to have done so; (iii) that under O. 12 r. 7 of the Rules, the High Court had no power to postpone the determination of the question, but must answer the claim of immunity upon the application to set aside the writ; (iv) that he had not, in any event, exceeded his mandate; and (v) that there was no serious question to be tried on the issue of immunity.

Held:

Per Gopal Sri Ram JCA

[1] Order 12 r. 7(1) of the Rules cannot be interpreted in the way suggested by the appellant. To accede to such interpretation would mean that in no case would the court be in a position to say whether a Special Rapporteur had acted within the scope of his mission. It would produce an unjust result as it would prohibit the court from dealing with each case according to its peculiar facts. Justice will not be achieved by a rigid approach to the terms of the rule of court.

[2] The learned judicial commisioner was not duty bound to decide the defendant's application in a summary fashion. She was, if the facts merited further investigation, entitled, as a matter of law, to put off the determination of the appellant's immunity until after she had had the benefit of *viva voce* evidence upon that issue. Whether she was correct in doing so in the instant case, however, constitutes a different issue involving the question of whether she had exercised her discretion correctly.

[3] An application to set aside a writ or to stay proceedings must be tested in the same way as an application to strike out a writ or other pleadings under O. 18 r. 19 of the Rules. Where the facts upon which challenge to jurisdiction is made are themselves in dispute, then those facts must be established in the usual way. If the affidavit evidence in an **interlocutory** matter is of such a quality that renders a trial unnecessary, a court may proceed to make findings based upon that evidence. But, in an **interlocutory** application, where the court feels it unsafe to make any definite findings, it is perfectly entitled to say so and order the matter to be determined at trial.

[3a] The test to be applied in determining whether a postponement is proper in any given case under O. 12 r. 7 is to determine whether they are serious questions that call for trial.

[4] The question whether the defendant uttered the alleged defamatory words in his private capacity or as Special Rapporteur is one of fact to be determined at the trial of the action. If the trial court finds that the defendant spoke the words in his personal capacity, no question of immunity can arise. If the court comes to the conclusion that the defendant did in fact speak as Special Rapporteur, it must go on and decide whether he acted within the terms of his mandate. Clearly, these are matters that amount to serious questions calling for trial of the action.

[4a] The rival contentions of the parties, as well as their affidavit evidence, had clearly raised a serious question. It would thus be patently unsafe to determine, in a summary fashion, the capacity in which the defendant uttered the impugned words. The court also cannot infer, from the language employed by the author of the article, that the defendant spoke solely as Special Rapporteur. The issue, in any case, is substantially an issue of fact which must be determined at trial, after hearing all the evidence.

[5] Clear words in statute are essential to exclude the court's power to review executive acts and to decide disputes *inter se* citizens and between citizens and the State. Such clarity of language is absent in the Convention, the 1949 Order or the Act. There is nothing in there to show that the Federation of Malaysia has, by treaty or legislation, surrendered its sovereign judicial power to any organ of the United Nations to make a finding of fact of the nature that forms the core of the litigation in the instant case.

[5a] The Secretary General, hence, does not have any power to make the kind of determination of fact he has made in his letter, namely, that the appellant spoke and published the words complained of in his capacity as Special Rapporteur. That question is for the court to decide and the stage for making such a determination has not as yet arrived. The Secretary General's opinion, in any event, did not bind the learned judicial commissioner and she was entitled to disregard the same.

[5b] The Minister's Certificate, likewise, cannot conclude the matter in the appellant's favour. The Minister has not certified **as a fact** that the appellant spoke the words complained of in his capacity as Special Rapporteur. The fact is therefore still at large and must necessarily be determined by the judge at trial.

[6] Reference to a treaty, such as the Convention, for the purpose of interpreting a municipal statute, such as the 1949 Order, that seeks to give effect to the former is permissible only where the latter is ambiguous. The proposition has no relevance whatsoever to a case where the provisions of the municipal statute that seeks to give effect to a treaty are plain and unambiguous.

[6a] Article 12 of the 1949 Order is clear and unambiguous. There is therefore no necessity to have resort to s. 22 of art. VI of the Convention for purposes of interpreting the said municipal legislation. It follows that the terms of the defendant's mandate has, at this stage, to be construed with reference to art. 12 and not s. 22 of art. VI of the Convention. Article 12 renders the defendant immune only if he spoke and published the words complained of in the exercise of his functions as a Special Rapporteur. This involves two elements, namely, the capacity in which the words were spoken, and secondly, whether he has exceeded his mandate.

[7] Upon the limited material available at this stage, it is not entirely beyond dispute whether the words were published by the appellant in exercise of his functions as Special Rapporteur. It therefore follows, upon the

proper interpretation of art. 12, that the question of the independence of the appellant in the exercise of his functions as Special Rapporteur is a matter that must *ex necessitae rei* be determined with reference to the terms of his mandate. Accordingly the question whether the appellant exceeded his mandate in the context of the immunity by him under art. 12 of the 1949 Order, as well as the construction of that Article, are matters for the trial judge to decide. They are serious questions to be tried.

[8] The appellant has failed to demonstrate that the learned judicial commissioner has committed an error that warrants appellate interference. She asked herself the right questions, took into account all relevant considerations and directed herself correctly on the applicable law. Above all, the order she made has not resulted in any injustice to the appellant. The appellant is entitled, at the conclusion of the trial, to a verdict in his favour in the event he establishes his claim to immunity on the facts.

[Appeal dismissed; orders of High Court affirmed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Bidang kuasa - Mahkamah Tinggi - Permohonan interlokutori - Membatalkan writ atas alasan kekebalan daripada guaman - Penentuan persoalan kekebalan - Samada merupakan suatu perkara budibicara hakim perbicaraan - Keputusan untuk menangguhkan penentuan isu di perbicaraan tindakan - Samada wajar - Aturan 12 k. 7 Kaedah-kaedah Mahkamah Tinggi 1980 - Skop dan kesan*

PROSEDUR SIVIL: *Bidangkuasa - Mahkamah Tinggi Guaman terhadap United Nations Special Rapporteur for the Independence of Judges and Lawyers - Membatalkan writ atas alasan kekebalan - Persoalan kekebalan - Samada merupakan persoalan fakta - Keputusan untuk menangguhkan penentuan persoalan di perbicaraan tindakan - Samada di dalam kuasa hakim perbicaraan - Samada terdapatnya persoalan serius untuk dibicarakan - Kaedah-kaedah Mahkamah Tinggi 1980, A. 12 k. 7*

Perayu dalam kes ini merupakan seorang peguambela dan peguamcara. Dalam tahun 1994, perayu telah dilantik sebagai United Nations Special Rapporteur for the Independence of Judges and Lawyers bagi tempoh selama tiga tahun. Lebihkurang dalam tahun 1995, perayu telah ditemuduga oleh majalah International Commercial Litigation, dan dalam temuduga itu, perayu telah membuat ulasan mengenai badan kehakiman Malaysia. Ulasan-ulasan itu kemudiannya telah diterbitkan oleh majalah tersebut. Responden-responden mendakwa bahawa perayu, dengan ulasan-ulasannya itu, telah berkata secara memfitnah mengenai mereka, dan dalam keadaan itu telah memulakan tindakan writ terhadap perayu atas libel dan slander.

Adalah tidak dipertikaikan bahawa menurut s. 22 Convention on the Privileges and Immunities of the United Nations, 1946 ('Konvensyen tersebut') dan art. 12 Diplomattic Privileges (United Nations and International Court of Justice) Order 1949 ('Aturan 1949 tersebut'), Special Rapporteurs seperti perayu diberi kekebalan daripada proses undang-undang bagi perkataan-perkataan yang diucapkan atau ditulis oleh mereka. Dalam menjalankan misi mereka. Adalah juga tidak dipertikaikan bahawa, selaras dengan guaman tersebut, satu Perakuan telah dikeluarkan oleh Setiausaha Agung Bangsa-bangsa Bersatu yang mengesahkan, pertamanya, kekebalan perayu, dan keduanya, bahawa perkataan-perkataan yang diragui itu telah diucap oleh perayu dalam menjalankan misinya sebagai seorang special rapporteur. Selain itu, Menteri Hal Ehwal Luar Negeri, Malaysia, telah juga mengeluarkan satu Perakuan di bawah s. 7 Akta Pertubuhan-Pertubuhan Antarabangsa (Hak-Hak Keistimewaan dan Kekebalan) 1992 ('Akta tersebut'), yang mengendorskan status dan mandat perayu sebagai seorang Special Rapporteur.

Perayu dalam keadaan itu, menuntut bahawa mahkamah tidak mempunyai bidangkuasa ke atas dirinya kerana kekebalan yang ada padanya, dan dalam keadaan yang sedemikian telah mengeluarkan saman di bawah A. 12 k. 7 Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah-kaedah tersebut') untuk mengenepikan writ itu.

Responden-responden namun begitu menegaskan bahawa perayu, dalam membuat kenyataan tersebut sedemikian rupa, telah bertindak di luar mandatnya dan dengan itu adalah tidak berhak kepada kekebalan.

Pesuruhjaya Kehakiman yang bijaksana telah memutuskan (i) bahawa fakta-fakta sepertimana yang terdapat di hadapan beliau tidak menolak bidangkuasa beliau (ii) bahawa Perakuan-Perakuan sepertimana yang dikeluarkan oleh Setiausaha Agung dan Menteri hanya mempunyai nilai percubaan yang tidak lebih daripada suatu pendapat semata-mata, dan dalam keadaan yang sedemikian membuat keputusan untuk tidak menghiraukannya (iii) bahawa kekebalan perayu merupakan sesuatu perkara yang tidak dapat diselesaikan menurut cara yang ringkas, dan oleh itu telah mengarahkan supaya isu itu ditentukan di perbicaraan tindakan itu. Akibatnya, saman perayu telah ditolak.

Perayu telah merayu dan berhujah di hadapan mahkamah semasa (i) bahawa Pesuruhjaya Kehakiman telah tersalah di sisi undang-undang dalam menangguhkan persoalan kekebalan kepada perbicaraan tindakan tersebut (ii) bahawa walaupun sekiranya Pesuruhjaya Kehakiman yang bijaksana mempunyai bidangkuasa untuk menundakan persoalan itu sedemikian rupa, berdasarkan fakta-fakta, beliau tidak seharusnya berbuat sedemikian (iii) bahawa di bawah A. 12 k. 7 Kaedah-kaedah tersebut, Mahkamah Tinggi tidak mempunyai kuasa untuk menangguhkan penentuan persoalan tersebut, tetapi semestinya menjawab

tuntutan kekebalan ketika permohonan untuk mengenepikan writ tersebut (iv) bahawa beliau telah tidak, dalam mana-mana keadaan, melampaui mandat beliau (v) bahawa tidak terdapatnya persoalan serius untuk dibicarakan berhubung dengan isu kekebalan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Aturan 12 k. 7(1) Kaedah-kaedah tersebut tidak boleh ditafsirkan menurut cara yang disarankan oleh perayu. Bagi menyetujui dengan pentafsiran yang sedemikian akan bermaksud bahawa mahkamah tidak akan mempunyai kedudukan dalam mana-mana kes untuk menyatakan samada seseorang Special Rapporteur telah bertindak dalam skop misinya. Ianya akan menghasilkan keputusan yang tidak adil kerana ianya akan melarang mahkamah daripada berurusan dengan setiap satu kes menurut fakta-faktanya yang khas. Keadilan tidak akan tercapai dengan pendekatan yang tegas terhadap syarat-syarat kaedah mahkamah.

[2] Pesuruhjaya Kehakiman yang bijaksana tidak terikat kepada kewajipan untuk memutuskan permohonan defendan secara ringkas. Beliau berhak, sekiranya fakta-fakta tersebut patut disiasat selanjut, menurut undang-undang, mengetepikan penentuan kekebalan perayu sehingga selepas beliau mendapat manfaat keterangan *viva voce* berhubung dengan isu itu. Samada beliau bersikap betul dalam melakukan sedemikian dalam kes semasa ini, walaubagaimanapun, membentuk isu lain yang melibatkan persoalan samada beliau telah melaksanakan budibicaranya secara betul.

[3] Sesuatu permohonan untuk mengenepikan writ atau untuk penggantung prosiding mestilah diuji dengan cara yang sama seperti sesuatu permohonan untuk membatalkan writ atau pliding-pliding lain di bawah A. 18 k. 19 Kaedah-kaedah tersebut. Di mana fakta-fakta ke atas yang mana telah dicabar oleh bidangkuasa dipertikaikan, maka fakta-fakta itu mestilah ditetapkan menurut cara yang biasa diamalkan. Jika keterangan afidavit dalam sesuatu perkara **intelokutori** mempunyai kualiti yang menyebabkan sesuatu perbicaraan tidak perlu, sesebuah mahkamah boleh meneruskan untuk membuat keputusan berdasarkan keterangan itu. Tetapi, dalam sesuatu permohonan **interlokutori**, di mana mahkamah merasakan bahawa ianya tidak selamat untuk membuat apa-apa keputusan yang pasti, ianya berhak sesungguhnya untuk menyatakan sedemikian dan memerintahkan perkara tersebut ditentukan di perbicaraan.

[3a] Ujian untuk dipakai dalam menentukan samada sesuatu penangguhan adalah wajar dalam mana-mana kes yang diberikan di bawah A. 12 k. 7 adalah untuk menentukan samada ianya merupakan persoalan-persoalan yang serius yang memerlukan perbicaraan.

[4] Persoalan samada defendan telah menyebut perkataan yang dikatakan bersifat memfitnah dalam kedudukan peribadinya atau sebagai special rapporteur adalah seuatu fakta yang harus ditentukan di perbicaraan tindakan tersebut. Jika mahkamah perbicaraan mendapati bahawa defendan telah mengucap perkataan-perkataan dalam kedudukan peribadinya, maka persoalan kekebalan tidak berbangkit. Jika mahkamah membuat keputusan bahawa defendan telah pada hakikatnya berucap sebagai special rapporteur, maka ianya mesti meneruskan dan memutuskan samada beliau telah bertindak dalam lingkungan terma-terma mandat beliau. Jelasnya, ini merupakan perkara-perkara yang membawa kepada persoalan serius yang menghendaki perbicaraan tindakan tersebut.

[4a] Penegasan-penegasan pihak-pihak tersebut yang berlawanan, dan juga keterangan afidavit mereka, telah dengan jelasnya membangkitkan persoalan yang serius. Ianya dengan itu nyata tidak selamat untuk ditentukan, dengan cara yang ringkas, kedudukan dalam mana defendan telah menyebut perkataan yang diragukan itu. Mahkamah juga tidak boleh membuat kesimpulan, dari bahasa yang digunakan oleh pengarang rencana tersebut, bahawa defendan telah berucap semata-mata sebagai special rapporteur. Isu itu, dalam apa-apa keadaan, adalah secara substantialnya merupakan satu isu fakta yang mesti ditentukan di perbicaraan, selepas mendengar kesemua keterangan.

[5] Perkataan-perkataan yang jelas dalam statut adalah penting untuk tidak menerima kuasa mahkamah bagi mengkaji semula tindakan-tindakan eksekutif dan untuk memutuskan pertikaian warganegara *inter se* dan antara warganegara dan Negeri. Kejelasan bahasa tidak terdapat dalam Konvensyen tersebut, Aturan 1949 atau Akta tersebut. Tidak terdapat apa-apa di dalamnya bagi menunjukkan bahawa Persekutuan Malaysia telah, melalui triti atau perundangan, menyerahkan kuasa kehakiman tertingginya kepada mana-mana badan Bangsa-Bangsa Bersatu untuk membuat keputusan fakta yang bersifat sedemikian yang membentuk teras litigasi dalam kes semasa.

[5a] Setiausaha Agung, dengan itu, tidak mempunyai apa-apa kuasa untuk membuat penentuan fakta yang sedemikian yang telah beliau buat dalam surat beliau, iaitu, perayu telah berucap dan menerbitkan perkataan-perkataan yang diadukan dalamn kedudukannya beliau sebagai special rapporteur. Persoalan itu adalah untuk diputuskan oleh mahkamah dan peringkat atau tahap untuk membuat penentuan yang sedemikian masih belum tiba lagi. Pendapat Setiausaha Agung, dalam apa keadaan pun, tidak mengikat Pesuruhjaya Kehakiman yang bijaksana dan beliau berhak untuk tidak menghiraukannya.

[5b] Perakuan Menteri, begitu juga, tidak boleh membuat keputusan yang memihak kepada perayu. Menteri tersebut telah tidak memperakui **sebagai satu fakta** bahawa perayu telah menyebut perkataan yang diadukan dalam kedudukan beliau sebagai Special Rapporteur. Fakta tersebut dengan itu masih tidak diberikan perhatian dan sudah tentu mesti ditentukan oleh Hakim di perbicaraan.

[6] Rujukan kepada suatu triti, seperti Konvensyen tersebut, bagi tujuan mentafsirkan statut munisipal, umpamanya A. 1949 itu, yang cuba menguatkuasakan yang terdahulu adalah dibenarkan hanya di mana yang terkemudian itu tidak jelas. Proposisi itu tidak mempunyai kaitan sama sekali kepada kes di mana peruntukan-peruntukan statut munisipal yang cuba untuk menguatkuasakan sesuatu triti adalah nyata dan jelas.

[6a] Artikel 12 A. 1494 adalah nyata dan jelas. Dengan itu adalah tidak perlu berpaling kepada s. 22 art. VI dari Konvesyen tersebut bagi tujuan mentafsirkan perundangan munisipal tersebut. Adalah didapati bahawa terma-terma mandat defendan hendaklah, diperingkat ini, ditafsirkan dengan rujukan kepada art. 12 dan bukannya s. 22 dari art. VI Konvensyen tersebut. Artikel 12 hanya memberikan kekebalan kepada defendan jika beliau berucap dan menerbitkan perkataan-perkataan yang diadukan itu dalam melaksanakan fungsi beliau sebagai seorang Special Rapporteur. Ini melibatkan dua unsur, iaitu, kedudukan dalam mana perkataan-perkataan itu telah diucapkan dan keduanya, samada beliau telah melampau mandatnya.

[7] Berdasarkan bahan-bahan yang ada diperingkat ini adalah terhad, ianya tidak secara keseluruhannya di luar pertikaian samada perkataan-perkataan itu telah diterbitkan oleh perayu dalam melaksanakan fungsi beliau sebagai Special Rapporteur. Dengan itu adalah didapati, setelah mentafsitrkan art. 12 dengan betul, bahawa persoalan kebebasan perayu dalam melaksanakan fungsi beliau sebagai Special Rapporteur adalah suatu perkara yang mesti *ex neccisitae rei* ditentukan dengan merujuk kepada terma-terma mandat beliau. Berikutan itu persoalan samada perayu telah melampaui mandat beliau dalam konteks kekebalan di bawah art. 12 A. 1949, dan juga pembentukan Artikel tersebut, adalah merupakan perkara-perkara yang harus diputuskan oleh hakim perbicaraan. Ianya merupakan persoalan-persoalan yang serius untuk dibicarakan.

[8] Perayu telah gagal untuk menunjukkan bahawa Pesuruhjaya Kehakiman telah melakukan kesilapan yang membenarkan campur tangan bidang rayuan. Beliau telah menanyakan dirinya sendiri soalan-soalan yang betul dan mengambil kira kesemua pertimbangan yang relevan dan telah

mengarahkan dirinya dengan betul berdasarkan undang-undang yang digunakan. Yang paling penting, perintah yang telah beliau buat telah tidak menyebabkan sebarang ketidak-adilan kepada perayu. Perayu adalah berhak, di pengulungan perbicaraan tersebut, kepada satu keputusan yang memihak kepadanya sekiranya beliau dapat menentukan tuntutan beliau kepada kekebalan berdasarkan fakta.

[Rayuan ditolak; perintah Mahkamah Tinggi diikrarkan.]

Cases referred to:

Beard v. London General Omnibus Co [1900] 2 QB 530 ***(refd)***

Dolfus Mieg United States of America v. Dolfus Mieg et Compagnie, SA [1952] 1 All ER 572 ***(refd)***

Engelke v. Musmann [1928] AC 433 ***(dist)***

Haile Selassie v. Cable & Wireless Ltd [1938] Ch 839 ***(refd)***

Hilton v. Thomas Burton (Rhodes) Ltd [1961] 1 WLR 705 ***(refd)***

Ho Kean v. Kong Lai Soo [1974] 2 MLJ 63 ***(cit)***

Juan Ysmael & Co Inc v. Government of the Republic of Indonesia [1954] 3 All ER 236 ***(dist)***

Maclaine Watson & Co Ltd v. Department of Trade & Industry [1989] 3 All ER 523 ***(refd)***

Rediffusion (Hong Kong) Ltd v. Attorney-General of Hong Kong (PC) [1970] AC 1136 ***(refd)***

Scaniainventor v. Commissioner of Patents [1981] 36 ALR 101 ***(foll)***

Sim Seoh Beng v. Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292 ***(refd)***

The Cristina [1938] AC 485 ***(refd)***

United States v. Melekh [1960] 190 F Supp 67 ***(refd)***

Legislation referred to:

Convention on the Privileges and Immunities of the United Nations, art VI, ss. 22(b), 23

Diplomatic Privileges (United Nations and International Court of Justice) Order 1949, Part D, art 12(b)

International Organizations Immunities Act, s. 7(b)

International Organisations (Privileges and Immunities) Act 1992, ss. 7(1), (2)

Rules of the High Court 1980, O. 12 r. 7(1), O. 18 r. 19

Other source referred to:

The Digest of International Law, vol 43, p 32

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: S3-23-68-1996]

For the appellant - Dr CV Das (Porres P Royan, S Nantha Balan & Trevor George De Silva with him); M/s Shook Lin & Bok

For the respondent - VK Lingham (V Sivaparanjothi, Peter Raj, R Thayalan & W Satchithandham with him); M/s V Siva & Partners

JUDGMENT

Gopal Sri Ram JCA:

The Background

This appeal raises an important point of practice and procedure in the context of the doctrine of immunity from suit. The matter arose in this way.

There is a magazine called "International Commercial Litigation". Though published in the United Kingdom, it has worldwide circulation. There appeared in the November issue of this magazine an article about our justice system. It was headed "Malaysian justice on trial". One David Samuels authored it. The article carried references to certain cases that had been dealt with by the courts of this country. Among these cases was one in which the plaintiffs (respondents in the appeal) were concerned. The article also reproduced, in direct quotes, words spoken by the defendant (the appellant in this appeal).

The plaintiffs took umbrage over the words published by the defendant. They formed the view that the defendant had injured their reputation. They issued writ for defamation. The defendant took advantage of the provisions of O. 12 r. 7 of the Rules of the High Court 1980 ('the Rules'). He entered conditional appearance with leave of court. Then, within the time limited by that rule, he took out a summons to set aside the writ on the ground that the court had no jurisdiction over his person because he was immune from suit. The defendant's claim for immunity rests on the ground that he was, at the material time, the United Nations Special Rapporteur on the Independence of Judges and Lawyers. In support of his claim, he relied, among other matters, on a letter written by the Secretary General of the United Nations and a certificate issued by the Honourable the Minister for Foreign Affairs of Malaysia ('the Minister'). These will be referred to later in this judgment.

The Judicial Commissioner's Approach

The defendant's summons came up before the learned judicial commissioner. After a hearing spread over several days, she reserved judgment. In a carefully considered judgment, she came to the conclusion that the defendant's immunity was a matter that was not capable of resolution in a summary manner. She therefore dismissed the summons and directed the defendant to deliver his defence. She also left it open to the defendant to raise in his statement of defence the immunity question for determination at the trial of the action. This is how she put it:

Having regard to the matter in its entirety it is inevitable that I need to postulate that at this interlocutory stage, it is not for me to determine whether the said words imputed to the defendant are defamatory or not. Only the question of jurisdiction looms large.

Towards that end, I must assume that all the allegations as enclosed in the statement of claim are true without deciding it to be so.

To do this I have to see whether the facts placed before me and the relevant laws cited to me oust the jurisdiction of this court.

It is a fact that the defendant is a Special Rapporteur with the United Nations. It is a fact that he made the statement to the magazine.

Even assuming for a moment that the statement is damning and consequently defamatory, I would have to ascertain whether it would exclude the defendant from the jurisdiction of this Court.

On the first point there is no dispute. Even on the second, the court's jurisdiction is not ousted even if *Mazilu's* case points otherwise, since the ICJ's decision is not binding on this Court on a point of public international law and in any event, on the facts made available to me at this interlocutory stage, there is no evidence to suggest that the test set out in *Mazilu's* case have been met.

Therefore hackneyed as it may sound, I must reiterate that for purposes of determining jurisdiction I must assume the allegation in the plaintiffs' statement of claim is true and:

> Since lack of jurisdiction has the consequence that the court has no right to enter upon the enquiry as to whether there exist a state of facts which would entitle the court to grant to the plaintiff the relief sought, the jurisdiction summons can succeed only if it is shown that no matter what were the facts, that the plaintiff would be able to establish relating to the subject matter of the dispute the court would have the power to grant relief of the kind sought against the defendant (per Lord Diplock in *Rediffusion (Hong Kong) Ltd v. Attorney General of Hong Kong* (PC) [1970] AC.

In the circumstances, I am unable to hold that the defendant is absolutely protected by the immunity he claims.

That does not mean however, that the defendant is estopped from adducing further evidence at trial to support his claim. If at the end of the trial of the plaintiffs' action, after taking all evidence from the parties, I come to the conclusion that immunity attaches to the defendant, the defendant may succeed at that stage. All I am deciding for the moment is that on the evidence before me, I have jurisdiction to hear this action (corrected before us) …

The Issues In The Appeal

Before us, the decision of the judge was attacked by the defendant on several grounds. However, at the end of two days of hearing, after the dust of conflict had settled, it became plain that the appeal really turned upon two issues. They may, we think, be conveniently summarised in the form of the following two questions:

(1) Was the judicial commissioner entitled, as a matter of law, to defer the question of the defendant's immunity?

(2) Even if she was, ought she to have done so on the facts of this case?

The first question concerns the existence of a discretion. The second concerns the correctness of the exercise of that discretion by the learned judicial commissioner. If, as contended by the defendant, the law vests no discretion in a High court to postpone the determination of his immunity from suit, then the first question must be answered in his favour. However, even if the first question is resolved against the defendant that is not an end of the matter. For, he is yet entitled to succeed if the High Court was wrong in exercising discretion to postpone its decision on the question of the defendant's immunity until it had tried the action.

It is with these matters in mind that we now turn to consider the two issues that lie at the heart of this appeal.

The First Issue: Is There A Discretion?

It is the defendant's argument that the judicial commissioner was wrong in failing to determine the claim of immunity in a summary fashion upon the summons before her. He says that the law gave her no choice in the matter. It is submitted that the learned judicial commissioner erred in postponing her determination of the defendant's immunity until the trial of the action. Her decision in this respect, the defendant argues, goes against the weight of authority.

To properly appreciate these arguments it is necessary to examine the relevant rule of court. It is O. 12 r. 7. And it reads as follows:

> 7(1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction.
>
> (2) An application under this rule must be made by summons.

It was submitted on the defendant's behalf that there is no power in the High Court under r. 7(1) of O. 12 of the Rules to postpone the determination of the question whether the court has jurisdiction over the person of a defendant. In other words, the defendant's claim of immunity must be answered either in his favour or against him upon his application to set aside the writ. Counsel for the defendant also submitted that, that is the way in which the rule has been previously applied.

In support of these arguments he referred us to *Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia* [1954] 3 All ER 236. He read the following passage in the advice of the Privy Council, delivered upon that occasion by Earl Jowitt:

> In whichever way the rule is stated it is apparent that difficulty may arise in the application of the second branch of it. Where the foreign sovereign state is directly impleaded the writ will be set aside, but where the foreign sovereign state is not a party to the proceedings, but claims that it is interested in the property to which the action relates and is, therefore, indirectly impleaded, a difficult question arises as to how far the foreign sovereign government must go in establishing its right to the interest claimed. Plainly, if the foreign government is required as a condition of obtaining immunity to prove its title to the property in question, the immunity ceases to be of any practical effect. The difficulty was cogently expressed by Lord Radcliffe in *Dolfus Mieg [United States of America v. Dolfus Mieg et Compagnie, SA* [1952] 1 All ER 572] where he said (at p. 588):
>
> > ... a stay of proceedings on the ground of immunity has normally to be granted or refused at a stage in the action when interests are claimed but not established, and, indeed, to require him (ie, the foreign sovereign) to establish his interest before the court (which may involve the court's denial of his claim) is to do the very thing which the general principle requires that our courts should not do.

Juan Ysmael (supra) concerned the claim by the Republic of Indonesia to a vessel based on a bill of sale purportedly made on the vendor's behalf by an agent who acted outside the scope of his authority. The appellant/vendor issued a writ *in rem* for possession of the vessel in question. The Republic entered a conditional appearance and applied to set aside the writ and all subsequent proceedings on the ground of sovereign immunity. It was contended on behalf of the Republic that it was being indirectly impleaded as the true owner of the vessel. The Appeal Court of Hong Kong upheld the claim for immunity and set aside the writ. The Privy Council, on further appeal, reversed that finding and restored the writ to file. The actual decision of the Board is accurately summarised in the headnote to the case in the All England Reports as follows:

Held: where a foreign sovereign state claims, in proceedings to which it is not a party, immunity from the court's jurisdiction for its alleged interests in property which is the subject of the proceedings, the bare assertion of a claim of title to the property is not enough to entitle the foreign sovereign state to that immunity; but once the court is satisfied that there are conflicting rights which have to be decided in relation to the claim of the foreign sovereign state and that the state's claim is not for rights which are illusory the state is entitled to immunity from the court's jurisdiction: and as, on the facts, the purported sale of the ship by the appellants' agent to the government of Indonesia was without authority, as the government's purchasing agent knew, the government had not established that, at the date when they claimed immunity (9 July 1952), they had any such interest in the ship as would show that they were impleaded, and accordingly the court had jurisdiction.

Counsel for the defendant has argued that the present case comes within the scope of the proposition formulated by Lord Radcliffe in the *Dolfus Mieg* case and quoted by Earl Jowitt in *Juan Ysmael.* Here too, says counsel, is a case where immunity is claimed but not established. To insist that the defendant's immunity be established at the trial of the action is to do the very thing which the court ought not to do.

The short answer to counsel's argument is that both *Dolfus Mieg* and *Juan Ysmael* were cases that concerned sovereign immunity which is absolute in nature. It is trite law that a foreign sovereign may not be impleaded in the domestic forum. And the decision of the House of Lords in *Dolfus Mieg* and that of the Board in *Juan Ysmael* are merely explanatory of the expression "impleaded" in the context of an assertion of proprietary or possessory rights. For the purpose of the doctrine of sovereign immunity, a foreign government is considered to be impleaded if property of which it is the owner or of which it is in possession or control is made the subject either (i) of an action *in rem* or (ii) of an action *in personam* by the judgment in which its proprietary or possessory rights might be affected. (See, *The Cristina* [1938] AC 485, 490 & 507; *United States of America v. Dolfus Mieg et cie (supra)*).

However, it is to be noted from the authorities upon the subject that even a plea of sovereign immunity in relation to possessory or proprietary rights may not always lie beyond curial investigation. (See, for example, *Haile Selassie v. Cable & Wireless Ltd.* [1938] Ch. 839, in particular the judgment of Sir Wilfrid Greene MR). The test is whether the property which is claimed is proved or admitted to belong to the foreign sovereign or is lawfully in his possession. Thus, in *Juan Ysmael,* the Privy Council subjected the evidence led on both sides to critical examination and came to the conclusion that the title claimed by the Republic of Indonesia to the vessel in question was, to use the words of Earl Jowitt, "manifestly defective". (See p. 242 of the report).

The quality of evidence available on record before the Board in that case made possible such a finding. However, it is difficult to envisage what may have happened if the evidence required further investigation.

It is therefore unsurprising to find that in *Dolfus Mieg* Lord Radcliffe was extremely careful in his choice of words when he laid down the governing principle. When he used the phrase "normally to be granted or refused" while referring to an application to stay proceedings under O. 12 r. 7, he undoubtedly had it in mind that cases may occur which, by the very nature of their peculiar facts, would not be "normal" and would therefore fall to be decided differently.

The present appeal falls well outside the scope of the doctrine of sovereign immunity. The defendant is not a foreign sovereign. The immunity he claims, as conceded by his counsel is not absolute. It is circumscribed by the terms of the mandate conferred upon him. That mandate is to be found in the defendant's own report (at p. 312 of Vol. 2 of the Appeal Record). This is what it says:

> At its fiftieth session, in resolution 1994/41 of 4 March 1994, the Commission on Human Rights, noting both the increasing frequency of attacks on judges, lawyers and court officials and the link which existed between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights, requested the Chairman of the Commission to appoint, for a period of three years, a special rapporteur whose mandate would consist of the following tasks: (a) to inquire into any substantial allegations transmitted to him and to report his conclusions thereon; (b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials, but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned; and (c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

If O. 12 r. 7 of the Rules receives the interpretation canvassed by the defendant, it would mean that in no case would the court be in a position to say whether a Special Rapporteur had acted within the scope of his mission. It would place the rule in a straight jacket and afford no flexibility whatsoever to its application. However abnormal a case may be, the High Court must, if counsel is correct in his submissions, resolve an immunity question summarily.

We are here dealing with a rule of court; not a statute enacted by Parliament. Rules of court are formulated to assist in the attainment of justice; not its obstruction. Hence, it is a settled principle that a rule of court must receive a construction that would not result in unfairness or produce a manifest injustice. See, *Sim Seoh Beng v. Koperasi Tunas Muda Sungai Ara Bhd.* [1995] 1 MLJ 292, 296.

An acceptance of the approach suggested by counsel would produce an unjust result. It would prohibit the court from dealing with each case according to its peculiar facts when dealing with an application under O. 12 r. 7 of the Rules. Justice will not be achieved by a rigid and unbending approach to the terms of that rule of court.

We must therefore dissent with the propositions advanced by counsel. In our judgment, the learned judicial commissioner was not duty bound to decide the defendant's application in a summary fashion. She was, if the facts merited further investigation, entitled, as a matter of law, to put off the determination of the defendant's immunity until after she had had the benefit of *viva voce* evidence upon that issue. Whether she was correct in doing so in the present instance goes to exercise of discretion. It falls within the scope of the second question to which we now turn.

The Second Issue: Was Discretion Correctly Exercised?

The alternate submission made in support of the appeal by Dr Das, of counsel for the defendant, is that even if O. 12 r. 7 permits a postponement of the immunity issue, the judicial commissioner was wrong in doing so in the present case. This argument, as we observed a moment ago, goes to the exercise of discretion by the judicial commissioner.

Dr Das argues that there was evidence before the judicial commissioner, which established conclusively the defendant's immunity. Counsel submits that there is no serious question to be tried on the issue of the defendant's immunity because there is no credible denial of the defendant's assertion that he spoke and published the alleged defamatory words while on mission as Special Rapporteur. It is also submitted that it is for the Secretary General to waive the immunity that attached to the defendant's office. Since that high official asserted immunity and the Minister had issued his certificate, there was no doubt that the plaintiffs could not implead the defendant. It is for the Secretary General to decide whether the defendant had exceeded the terms of the mandate given him. In any event, the defendant had not exceeded the terms of his mandate.

Datuk Lingham's response is that in the circumstances of the present case, no concluded view upon the question of the defendant's immunity is possible at this stage of the proceedings. Counsel submits that the very article in which the defendant is described as Special Rapporteur has been impugned as untrue. The defendant wears many hats. Apart from being a Special Rapporteur, he is also an advocate and solicitor with a private commercial interest. It is submitted that neither the letter from the Secretary General nor the Minister's certificate are conclusive of the defendant's immunity, which is a matter the

a High Court must determine after a trial upon all issues. Datuk Lingham has also submitted that the defendant's claim that he spoke the words while on mission is under challenge by the plaintiffs. He argues that there are serious questions to be tried.

b As to the test that is to be applied in determining whether a postponement is proper in any given case under O. 12 r. 7, counsel on both sides stand upon common ground. They submit that the correct approach is to determine whether there are any serious questions that call for a trial. We agree.

c An application to set aside a writ or to stay proceedings must, as correctly submitted by Dr Das, be tested in the same way as an application to strike out a writ or other pleading under O. 18 r. 19 of the Rules. Where the facts upon which challenge to jurisdiction is made are themselves in dispute, then, those facts must be established in the usual way. If the affidavit evidence in an **interlocutory** matter is of such a quality that renders a trial unnecessary, *d* a court may proceed to make findings based upon that evidence. But, in an **interlocutory** application, where the court feels it unsafe to make any definite findings, it is perfectly entitled to say so and order the matter to be determined at trial. It may be added for completeness that where jurisdiction is challenged, the facts as pleaded in the statement of claim must be assumed to be true. *e* See, *Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong* (PC) [1970] AC 1136.

The extent of the disagreement between the disputants before us is focussed upon a single question. It is whether there are serious issues to be tried. If Dr Das is correct in the primary submission that he makes, namely, that there *f* are no serious questions warranting a trial, it follows that the learned judicial commissioner erred in postponing her decision on the defendant's immunity.

For the purpose of addressing the question at hand, it is necessary, as a first step to identify some of the salient issues that form the axis of the dispute between the parties. For the purposes of the present appeal three are readily *g* identifiable. They are as follows:

(1) Whether the defendant spoke and published the words complained of while on mission, that is to say, in his capacity as Special Rapporteur;

h (2) Whether it is the court or the Secretary General who should determine whether the defendant exceeded the terms of his mandate when he spoke and published the alleged defamatory words; and

(3) If it is the court and not the Secretary General who should make the determination, then, whether the defendant did in fact exceed the terms *i* of his mandate.

Although each of these questions flows from one to the next, it is preferable to deal with them separately.

The Capacity In Which The Defendant Spoke

Dr Das argues that the question of capacity is capable of summary determination, and, because the evidence in relation to it has not been credibly denied, it ought to be resolved in the defendant's favour. Accordingly, submits counsel, the judicial commissioner erred in reserving this issue to trial.

The primary evidence relied on by the defendant in support of this submission is the impugned article itself. Counsel read two passages, which he said, concluded the point in the defendant's favour. The first passage in the article in question is as follows:

> Param Cumaraswamy who has a global mandate from the United Nations to investigate complaints such as those circulating in Malaysia at present, reports that he has received enquiries about Malaysia from foreign businessmen. Originally a counsel at the Malaysian firm of Shook Lin & Bok, he says: 'It would be unfair to name any names, but there is some concern about all this among foreign businessmen based in Malaysia, particularly among those who have litigation pending.'

The second passage reads as follows:

> Cumaraswamy thinks Malaysia would not be able to repeat that result at present. 'Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice,' he says. 'But I do not want any of the people involved to think I have yet made up my mind.
>
> Cumaraswamy says that, although these complaints 'only came to prominence because of the judge-choosing allegations in the Ayer Molek affair, people first started to question the integrity of the judiciary after the M$10 million ($4 million) libel award which Vincent Tan received on October 22 last year.'

Dr Das argues that these passages make it clear that the defendant spoke and published the alleged defamatory words in his capacity as special rapporteur. Datuk Lingham, however, pointed out that the article contains a material error. It describes the defendant as "originally a counsel at the Malaysian Firm of Shook Lin & Bok." Counsel for the plaintiffs says that this is plainly wrong. He has pointed out that the defendant was in truth and fact, at the date of the article, the chief executive partner of the said firm of solicitors. It was further argued that the truth of the whole of the impugned article was under challenge, including the allegation by the author that the defendant was interviewed and spoke in his capacity of Special Rapporteur. The plaintiffs also argue that the defendant wore several hats and that he made the alleged

defamatory statements in his capacity as an advocate and solicitor and not as Special Rapporteur. That is why, Datuk Lingham says, the defendant was sued in such capacity. Counsel submits that the plaintiffs should not be shut out at this stage of the proceedings from redeeming their reputation by having such a hotly contested point determined in a summary fashion.

These rival contentions amount, in our judgment, to a serious question. We are of the view that it would be patently unsafe to determine, in a summary fashion, the capacity in which the defendant uttered the impugned words.

Suffice to say that the article in itself does not expressly declare that the defendant was interviewed and spoke the alleged defamatory words as Special Rapporteur. What his counsel has done is to invite this court to infer, from the tenor of the language employed by the author of the article, that the defendant spoke as Special Rapporteur.

With respect, we must decline this invitation. The issue under discussion is substantially an issue of fact. Like any other fact it must be determined at trial, after hearing all the evidence led upon it and after a mature consideration of the submissions to be made on both sides.

So far as the affidavit evidence is concerned, we have carefully considered these and have come to the conclusion that they do raise a serious dispute as to the capacity in which the defendant was alleged to have spoken and published the words complained of. In the circumstances of the present case, and in fairness to both sides, it would have been most unwise of the judicial commissioner to have embarked upon a summary resolution of the point at issue. In our judgment she was entirely correct in reserving her decision until after the trial of the action.

Who Decides Excess Of Mandate?

Dr Das has argued that it is for the Secretary General of the United Nations to decide whether the defendant exceeded the mandate granted him. If the Secretary General took the view that the defendant had exceeded the terms of his mandate, the former would have waived the latter's immunity. This did not happen. Counsel points out that, instead of a waiver of immunity, there has been an assertion of it. In support he referred to the letter from the Secretary General. We spoke of it earlier in this judgment. It is in the following terms:

To Whom It May Concern

In connection with Civil Suit No. S3-23-68-1996 by MBf Capital Berhad and MBf Northern Securities Sdn. Bhd. against Dato' Param Cumaraswamy, the Secretary-General of the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Param Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Articles VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 26 October 1957 without any reservation.

In accordance with section 22 of Article VI of the Convention, 'experts ... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions …' Section 22(b) of the Convention further provides that 'they shall be accorded, in respect of words spoken or written and acts done by them in the course of performance of their mission, immunity from legal process of every kind'. As such, the Special Rapporteur on the Independence of Judges and Lawyers is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of performance of his mission.

The Secretary-General has determined that the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from lega1 process with respect thereto.
Under section 34 of the Convention, the Government of Malaysia has a legal obligation to 'be in a position under its own law to give effect to the terms of this Convention'. The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

The letter from the Secretary-General is dated 7 March 1997. Five days later, that is to say, on 12 March 1997, the Minister issued his certificate under s. 7(1) of the International Organisations (Privileges and Immunities) Act 1992 ('the Act'). That certificate is in the following terms:

I, DATUK ABDULLAH BIN HJ. AHMAD BADAWI, Minister of Foreign Affairs, Malaysia by virtue of the power granted to me under section 7(1) of the International Organisations (Privileges and Immunities) Act 1992 (Act 485) hereby certify that Dato' Param Cumaraswamy was appointed by the United Nations in 1994 for a period of three years as Special Rapporteur on the Independence of Judges and Lawyers, whose mandate is as follows:

a) to inquire into any substantial allegations transmitted to him and report his conclusions;

b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned;

c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

2. Under the Convention on the Privileges and Immunities of the United Nations 1946 and under the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 Dato' Param Cumaraswamy shall enjoy the privileges and immunities as are necessary for the independent exercise of his functions. He shall be accorded immunity from legal process of every kind only in respect of words spoken or written and acts done by him in the course of the performance of his mission.

Relying upon these two documents, Dr Das submitted that the defendant's immunity from suit for the words spoken was beyond argument. He drew our attention to the relevant provisions in the Convention on the Privileges and Immunities of the United Nations ('the General Convention'), the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 ('the 1949 Order') and the Act. They are as follows.

First ss. 22(b) and 23 of art. VI of the General Convention which are in the following terms:

22 Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(a) ...

(b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.

> 23 Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Next, art. 12(b) which appears under Part D of the 1949 Order headed "Persons employed on missions on behalf of the United Nations". It provides thus:

> 12. Except in so far as in any particular case any privilege or immunity is waived by the Secretary-General of the United Nations, persons employed on missions on behalf of the United Nations shall enjoy -
>
> (a) while exercising their functions as such, as during their journey to and from the place of meeting, immunity from personal arrest or detention and from seizure of their personal baggage and inviolability for all papers and documents;
>
> (b) immunity from legal process of every kind in respect of words spoken or written and all acts done by them in the exercise of these functions.

Lastly, s. 7(1) of the Act which makes the following provision:

> 7(1) The Minister may give a certificate in writing certifying any fact relating to the question whether a person is, or was at any time or in respect of any period, entitled, by virtue of this Act or the regulations, to any privileges or immunities.
>
> (2) In any proceedings, a certificate given under this section is evidence of the facts certified.

Dr Das cited a number of authorities in support of his arguments on this point. Arguing against the proposition advanced by the defendant, Datuk Lingham too referred us to several authorities. While we fully appreciate the industry of counsel on both sides, for which we are very grateful, we find a discussion of all the cases and works of authors learned on the subject cited to us by counsel to be unnecessary to arrive at our conclusion.

With respect, we are unable to agree with Dr Das' submission that the defendant's immunity from suit is a matter beyond a peradventure because the Secretary General has already expressed his view that the words complained of were uttered by the defendant (to quote from his letter) "in the course of his mission". We are also unable to agree with his argument that the Minister's certificate, which is evidence of the facts therein stated, concludes the matter in the defendant's favour. Our reasons are as follows.

First, so far as the Secretary General's letter is concerned, neither the General Convention nor the 1949 Order, nor indeed the Act, confers any power or authority upon him to declare that the words complained of were spoken by the defendant in his capacity as Special Rapporteur. Indeed counsel for the defendant has plainly failed to demonstrate that the Federation of Malaysia has, by treaty or legislation, surrendered its sovereign judicial power to any organ of the United Nations to make a finding of fact of the nature that forms the core of the litigation in the instant case. It is axiomatic that the judicial power of the Federation of Malaysia, which is vested in its courts, is not to be lightly treated as having been excluded by treaty or even by municipal legislation.

The power vested in the judicial arm of Government to review executive acts and to decide disputes *inter se* citizens and between citizens and the State is jealously guarded. Clear words in a statute are essential to exclude that power. Needless to say, such clarity of language is absent in the General Convention, the 1949 Order and the Act.

Accordingly, we are satisfied that the General Convention and the 1949 Order merely confirm the Secretary General's power to waive immunity. With respect to counsel for the defendant, there is absent any power in the Secretary General to make the kind of determination of fact he has made in his letter, namely, that the defendant spoke and published the words complained of in his capacity as Special Rapporteur. That is a question for our courts to decide. And the stage for making such a determination has not as yet arrived. The suggestion that the Secretary General may by the stroke of his pen exclude the power of the High Court to make the factual determination upon which the defendant's immunity is postulated is, with respect, an invitation to journey from the sublime to the ridiculous, which we must with respect, decline to accept. In our judgment, the learned judicial commissioner was plainly correct in refusing to act upon the mere *ipse dixit* of the Secretary General on the question of the capacity in which the defendant spoke the words complained of.

Second, in so far as the Minister's certificate is concerned, it adds nothing in the defendant's favour. That certificate is, as the second subsection to s. 7 declares, "evidence of the facts certified." Dr Das says that phrase means "conclusive evidence". Datuk Lingham disagrees. He submits that "evidence" is miles apart from "conclusive evidence".

We do not feel compelled to resolve the conflict at this stage. Suffice to say that even if Dr Das is correct in his submission; and we are not for a moment to be taken as saying that he is; the Minister has not certified **as a fact** that the defendant spoke the words complained of in his capacity as Special Rapporteur. That fact is therefore still at large and must necessarily be

determined by the judge at trial. All that the Minister's certificate does is to reproduce the extent of the defendant's immunity in general terms. In our judgment the certificate does not conclude the matter to the extent contended by the defendant.

The reliance placed by defendant's counsel on the decision in *Engelke v. Musmann* [1928] AC 433 in this connection is, with respect, not well founded. That case concerned an action for arrears of rent. The defendant, Engelke, applied to set aside the writ. He filed two affidavits in support of his application. The plaintiff, Musmann, applied for an order to have Engelke cross-examined on those affidavits. The judge in chambers ordered cross-examination. Engelke appealed. Before the Court of Appeal, the Attorney-General appeared at the request of the Foreign Office and, on being invited, made a statement to the effect that Engelke had been appointed as the Consular Secretary to the German Ambassador and had been received in that capacity by the government of Great Britain. The Court of Appeal by a majority (Lord Hanworth dissenting) declined to accept the Attorney-General's statement. It dismissed the appeal. On further appeal, the House of Lords formed the view that the Attorney-General's statement on the defendant's status should be accepted as conclusive. The House accordingly held that the defendant was immune from process by reason of the provisions of the Diplomatic Privileges Act 1708. It was in this context that Lord Buckmaster made the observations now relied upon by Dr Das in support of the instant defendant's appeal.

The following passage from Lord Buckmaster's speech was read to us by counsel in support of the argument that the defendant's claim to immunity from process was, in the public interest, a necessary restraint upon the judicial power of the courts of this country:

> It is, of course, obvious that the privilege claimed has serious results, as it excludes from their remedies in the courts the people with whom members of the ambassador's staff may have incurred obligations, and it is possible that it is open to abuse. It is of the essence of all privilege that it may be abused, but that question has nothing to do with the matter we are called upon to decide; the merits of the dispute out of which this question has arisen are in no way before us for consideration. The privilege itself depends upon maintaining the obligations of international law and the comity of nations. It would, indeed, be unfortunate if, after recognition had been afforded by His Majesty through the Foreign Office to people as holding such posts on the ambassadorial staff as entitled them to the privilege and the statement as to their position had been afforded on behalf of the Crown through the Attorney-General, it was to be disregarded by the judiciary, for, in such circumstances, the ensuing contest could not possibly inure to the public good.

The present case does not concern diplomatic immunity. The views expressed by Lord Buckmaster in the passage above-quoted, therefore, do not, in our judgment assist the defendant. We do, of course, take full cognisance of the Minister's certificate and give it all the weight Parliament says it shall have. But the certificate, beyond stating as a fact that the defendant is a Special Rapporteur, does not go further to certify that the words complained of were spoken by the defendant in that capacity. The Minister has therefore, very properly, left open that fact to be determined by the court.

It is clear that the capacity in which the defendant spoke the impugned words is intertwined with his mandate. The former is, as we have earlier said, a matter for the courts to decide. It follows that the latter must also be resolved in like fashion.

In our judgment the question whether the defendant exceeded the terms of his mandate is not a matter for the Secretary General to decide. It is a question that the court must determine according to the evidence presented at the trial. The opinion expressed by the Secretary General did not therefore bind the learned judicial commissioner. She disregarded it. She was entitled to do so. Her decision in this respect is correct.

To reiterate, the question whether the defendant uttered the alleged defamatory words in his private capacity or as Special Rapporteur is one of fact to be determined at the trial of the action. If the trial court finds that the defendant spoke the alleged defamatory words in his personal capacity, no question of immunity can arise. For, neither the Secretary General nor the Minister may assert immunity on behalf of the defendant in respect of words uttered by him in his capacity as advocate and solicitor. If the court comes to the conclusion that the defendant did in fact speak as Special Rapporteur, it must go on and decide whether he acted within the terms of his mandate. Clearly, these are matters that amount to serious questions calling for a trial of the action.

However, before we move further, there is one other comment that we wish to make about the Secretary General's letter. It appears that the Secretary General has asserted the defendant's immunity in terms that clearly fall outside the scope of the General Convention and the 1949 Order.

Section 22 of art. VI of the General Convention confers upon experts on mission immunity for acts done and words written or spoken "in the course of the performance of their mission". Article 12(b) of the 1949 Order, on the other hand, confers immunity upon persons employed on missions on behalf of the United Nations, "in the exercise of these functions". These words mean, of course, that persons, such as the defendant, are immune from suit or prosecution so long as their acts were done, or their words were spoken or written, in the exercise of their functions.

However, the Secretary General has, in his letter, taken the position that the defendant uttered the words complained of "in the course of his mission", and is therefore immune from suit. We are however of the view that the phrase employed by the Secretary General in his letter is of much wider import than that appearing in either the General Convention or the 1949 Order. For, a person may be "in the course of his mission" and yet commit acts that are not "in the exercise of these functions". The point comes into sharp focus in cases where it is shown that a defendant wears, so to speak, more than one hat. That appears to the case here. The same would apply with equal force where a trial court finds that acts were done or statements made in circumstances that *prima facie* fall outside the terms of a rapporteur's written mandate.

We therefore agree with the submission of Datuk Lingham that the Secretary General's letter is not conclusive and that it appears to create a new class of immunity not contemplated by, and falling outside the scope of, the General Convention and the 1949 Order.

With that we turn to the third question.

Did The Defendant Exceed His Mandate?

Dr Das argues that his client did not exceed the mandate given him. It is his submission that the mandate should be construed liberally and not strictly. If a strict construction is placed upon the terms of the mandate, it may unduly curb or impede the independence of the defendant as special rapporteur in the performance of his work. It is contended that the defendant, as Special Rapporteur, must not only interview people but also permit himself to be interviewed by journalists. Counsel accordingly submits that although the words were spoken by the defendant during an interview conducted by a journalist, the occasion nevertheless comes within the terms of the defendant's mandate.

Datuk Lingham's submits that at this stage of the proceedings the plaintiffs have *prima facie* demonstrated that the defendant exceeded the terms of his mandate when he spoke the words complained of. He argues that whether the defendant acted within the terms of his mandate is a serious question that must be determined at the trial of the action.

After careful consideration we find ourselves in agreement with Datuk Lingham's submissions. Our reasons for accepting them in preference to those advanced by Dr Das are as follows.

First, the construction of the mandate.

In support of his argument for a wide construction of the mandate, counsel relies on the opening paragraph of s. 22 of art. VI of the General Convention which confers immunities upon experts on missions "as are necessary for the independent exercise of their functions". He submits that Malaysia, as a party to the General Convention, without reservation, was obliged to and did take steps to incorporate the General Convention into its municipal law by making the 1949 Order. It is Dr Das' submission that art. 12 of the 1949 Order should be interpreted to bring it in line with s. 22 of art. VI. According to him, this is because the former intends to give statutory effect to the latter.

In support of this contention counsel referred us to the decision of the House of Lords in *Maclaine Watson & Co Ltd. v. Department of Trade & Industry* [1989] 3 All ER 523. Since it is a case also relied on by Datuk Lingham, we consider it desirable to quote at some length from the speech of Lord Oliver of Aylmerton. This is what the learned Law Lord said (at pp. 544-5):

> There is, as indeed there can be, little contest between the parties as to the general principles on which that which has been referred to as the doctrine of non-justiciability rests, though they approach it in rather different ways. The contest lies not so much as to the principle as to the area of its operation.
>
> It is axiomatic that municipal courts have not and cannot have the competence to adjudicate on or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. That was firmly established by this House in *Cook v. Sprigg* [1899] AC 572 at 578, and was succinctly and convincingly expressed in the opinion of the Privy Council delivered by Lord Kingsdown in *Secretary of State In Council of India v. Kamachee Boye Sahaba* [1859] 13 Moo PCC 22 at 75:
>
> > The transactions of independent States between each other are governed by other laws than those which Municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they make.
>
> On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the royal prerogative, the validity of which cannot be challenged in municipal law: see *Blackburn v. A-G* [1971] 1 All ER 1380. The Sovereign acts:
>
> > throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts.
>
> (See *Rustomjee v. R* [1876] 2 QBD 69 at 74 per Lord Coleridge CJ)

That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

These propositions do not, however, involve as a corollary that the court must never look at or construe a treaty. Where, for instance, a treaty is directly incorporated into English law by Act of the legislature, its terms become subject to the interpretative jurisdiction of the court in the same way as any other Act of the legislature. *Fothergill v. Monarch Airlines Ltd* [1981] 2 All ER 696, [1981] AC 251 is a recent example. Again, it is well established that where a statute is enacted in order to give effect to the United Kingdom's obligations under a treaty the terms of the treaty may have to be considered and, if necessary, construed in order to resolve any ambiguity or obscurity as to the meaning or scope of the statute. Clearly, also, where parties have entered into a domestic contract in which they have chosen to incorporate the terms of the treaty, the court may be called on to interpret the treaty for the purposes of ascertaining the rights and obligations of the parties under their contract: see, for instance, *Philippson v. Imperial Airways Ltd* [1939] 1 All ER 761, [1939] AC 332.

Further cases in which the court may not only be empowered but required to adjudicate on the meaning or scope of the terms of an international treaty arise where domestic legislation, although not incorporating the treaty, nevertheless requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation (as in *Zoernsch v. Waldock* [1964] 2 All ER 256, or the very rare case in which the exercise of the royal prerogative directly effects an extension or contraction of the jurisdiction without the constitutional need for internal legislation, as in *Post Office v. Estuary Radio Ltd* [1967] 3 All ER 679, [1968] 2 QB 740.

It must be borne in mind, furthermore, that the conclusion of an international treaty and its terms are as much matters of fact as any other fact. That a treaty may be referred to where it is necessary to do so as part of the factual background against which a particular issue arises may seem a statement of the obvious. But it is, I think, necessary to stress that the purpose for which such reference can legitimately be made is purely an evidential one. Which

> states have become parties to a treaty and when and what the terms of the treaty are, are questions of fact. The legal results which flow from it in international law, whether between the parties *inter se* or between the parties or any of them and outsiders are not and they are not justiciable by municipal courts."

In so far as is relevant to the case at hand, the principle that emerges from the foregoing passage is that reference to a treaty, such as the General Convention, for the purpose of interpreting a municipal statute, such as the 1949 Order, that seeks to give effect to the former is permissible only where the latter is ambiguous. But the proposition has no relevance whatsoever to a case where the provisions of the municipal statute that seeks to give effect to a treaty are plain and unambiguous. That much is made clear by the decision of the Federal Court of Australia (General Division) in *Scaniainventor v. Commissioner of Patents* [1981] 36 ALR 101 (a case referred by us to counsel during argument). There, Fox, Franki and Northrop JJ when delivering the joint judgment of the court made the following observation (at p. 106 of the report) with which we express our agreement:

> Moreover, it is open to the municipal law of a country to enact provisions which give effect to those of the treaty in its own way. If the municipal law does not accord with the Treaty (and this can only be decided by an application of ordinary principles), the provisions of the municipal law prevail. The construction of the Treaty itself will be decided, as between nations, according to rules wider than those by which we construe our own legislation.

Article 12 of the 1949 Order is clear and unambiguous in the provision it has made by its terms. There is therefore no necessity to have resort to s. 22 of art. VI of the General Convention for purposes of interpreting the municipal legislation in this case. As was pointed out to counsel during argument, art. 12 of the 1949 Order is, by its terms, narrower than s. 22. Our courts are therefore unconcerned with the language of s. 22 of art. VI. They must, instead, confine themselves to the language actually used by art. 12 of the 1949 Order.

It follows therefore that the terms of the defendant's mandate has, at this stage, to be construed with reference to art. 12 and not s. 22 of art. VI of the General Convention. As earlier observed, art. 12 renders the defendant immune only if he spoke and published the words complained of in the exercise of his functions as a special rapporteur. This involves the two elements. The first is the capacity in which the words were spoken. That, as we earlier said, is a question which falls to be resolved at the trial. The second element is the defendant's mandate, the question being whether he exceeded it on the facts peculiar to this case.

As a general rule, where a tortious act is committed in excess of authority, it may be inferred, in the absence of other facts, that the tortfeasor was on a frolic of his own and was therefore acting in his personal capacity. The cases of *Beard v. London General Omnibus Co.* [1900] 2 QB 530 and *Hilton v. Thomas Burton (Rhodes) Ltd.* [1961] 1 WLR 705 are illustrative of this proposition and go to demonstrate that, in the law of torts, the question whether an act was performed within the scope of a tortfeasor's authority is one of fact and of degree.

In the present instance, the defendant's mandate, which we have reproduced in full earlier in this judgment, is, in summary, confined to:

(a) the making of inquiries into any substantial allegations transmitted to him and to report his conclusions thereon;

(b) identifying and recording attacks on the independence of the judiciary, lawyers and court officials;

(c) making concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned; and

(d) studying important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

In short, the scope of the defendant's function is to inquire and report to the Commission on Human Rights upon matters that concern the independence of judges and lawyers. Nowhere by its terms does the mandate authorise interviews to members of the press. Thus, in our view, upon the very limited material available at this early stage of the proceedings, it is not entirely beyond dispute whether the words complained of were published by the defendant in the exercise of his functions as Special Rapporteur.

It follows from our interpretation of art. 12 that the question of the independence of the defendant in the exercise of his functions as Special Rapporteur is a matter that must *ex necessitae rei* be determined with reference to the terms of his mandate. Accordingly, the question whether the defendant exceeded his mandate in the context of the immunity claimed by him under art. 12 of the 1949 Order, as well as the construction of that Article, are matters for the trial judge to decide. Indeed, they are serious questions to be tried.

Dr Das' argument that the defendant's mandate includes not only a right to interview, but also to be interviewed, is one that must await pronouncement on its merits until the trial of the action. It is not an argument upon which we should give any concluded view at this stage of the proceedings.

In our judgment, each case must be decided according to its own facts. There may be circumstances in which statements made by a Special Rapporteur during an interview come well within the scope of his mandate. On the other hand a fact pattern may emerge that leads to the conclusion that what was said or done at such an interview was in excess of the authority given to a Special Rapporteur.

There is no harm in anybody agreeing to an interview by members of the print or electronic media. Whether he is prepared to submit himself to such an interview, the matters that he chooses to speak upon and the words he uses are, of course, entirely within his discretion. But, where, in the course of an interview, disparaging remarks are made of a plaintiff and there is an attack on reputation, it must be determined according to the facts of each case whether the immunity claimed applies to the occasion upon which the words were uttered.

So too here. It is a matter for the trial judge to determine on the totality of the evidence to be led at the trial whether the defendant was acting within the terms of his mandate when he gave the interview and spoke the alleged defamatory words.

Exercise Of Discretion: An Overview

To summarise, the three issues earlier identified by counsel during argument are serious questions to be tried. They were manifestly unsuitable to be resolved in a summary fashion having regard to the peculiar facts of this case.

Earlier in this judgement, we observed that the defendant's second and alternative submission that the judicial commissioner erred in postponing the determination of the defendant's immunity went to the exercise of discretion. The principles that govern appeals against the exercise of discretion are well settled and beyond argument.

The initial function of an appellate court in such cases is one of review only. An appellate court has no original discretion to exercise until and unless an appellant demonstrates that the judge at first instance took into account irrelevant considerations, or failed to take into account relevant considerations, or asked himself or herself the wrong question, or erred in point of principle or that the order made would result in injustice. Looking at the matter as a whole, on a broad overview, we are satisfied that the present appeal does not fall within any of these categories.

In our judgment the defendant has failed to demonstrate that the learned judicial commissioner has committed an error that warrants appellate interference. She asked herself the right questions, took into account all

relevant considerations and directed herself correctly on the applicable law. Above all, the order she made has not resulted in any injustice to the defendant. There has been no ruling against immunity, the judicial commissioner taking much care to leave that issue open to be decided at the trial of the action. The defendant is entitled, at the conclusion of the trial, to a verdict in his favour in the event he establishes his claim to immunity on the facts.

The Approach

Dr Das reminds us that we must ensure that we ought not to, by our decision, set a dangerous precedent by adopting a robust approach to the question of the defendant's immunity. With respect, we need no reminder of our duty of which we are most conscious. But it must be borne in mind, by all concerned, that an assertion of immunity is not to be likened to the rubbing of the lamp by Aladdin. There is no magic in it. Any belief entertained to the contrary must be abandoned soonest.

Each case where immunity is asserted has to be dealt with on its own facts. Whether a particular fact pattern attracts immunity is for the courts to decide in the exercise of their constitutional function. If a court holds that immunity does not attach to an individual in a given set of circumstances, that is an end of the matter. The governing principles are well settled. But their application varies according to the peculiar circumstances of each case. The present appeal is merely one such instance.

We note with satisfaction that courts of other jurisdictions have adopted a similar approach. Thus, in *United States v. Melekh* [1960] 190 F Supp. 67 the Federal District Court (Southern District of New York) denied immunity to an official of the United Nations despite a letter of verification. Similarly, the Court of Appeal of Paris, in 1961, in the case of *Ali Ali Reza c. consorts Grimpei* denied the Saudi Arabian delegate's claim of immunity on the ground that the immunity conferred upon members who attended the Third Session of the General Assembly (held in Paris in 1948) by the equipollent French decree was limited to acts and words spoken and written in the exercise of their functions and had no application to a private contract made prior to the session and continued after its close. These and other examples are to be found in *"The Digest of International Law"* Vol. 43, p. 32 *et. seq.*

The issue of immunity has been considered very recently by the United States District Court for the Northern District of California in *Corrinet v. Ginns* (Case No. C 97-0142 FMS, decided on 21 May 1997, yet unreported). The defendant, Ginns, was an official employed by the United Nations. The plaintiff, Corrinet, had commenced an earlier action against the United Nations, its then Secretary

General, Boutros Boutros-Ghali and other persons, including the defendant, Ginns claiming damages for defamation in respect of certain statements that Ginns had made concerning the genuineness of a document in the plaintiff's possession. Weigel J dismissed the first action on the ground that the defendants enjoyed immunity for words spoken or written in their official capacity. However, the court gave the plaintiff leave, if he so wished, to sue Ginns, in the latter's personal capacity. Pursuant to this order the plaintiff commenced the second action against the defendant Ginns. The court struck out the second action on the ground that the plaintiff's pleading did not adequately raise a cause of action against the defendant in his personal capacity. It held that on the facts pleaded by the plaintiff, the defamatory remarks had been made by Ginns in his official capacity for which he was immune from suit by reason of s. 7(b) of the International Organizations Immunities Act (22 U.S.C. s. 288d(b)) which provides that officers and employees of the United Nations are "immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as ... officers, or employees except as insofar as such immunity may be waived" by the United Nations.

Fern M. Smith J, when delivering judgment, said:

> Plaintiff argues that this action should not be dismissed on the ground of immunity because plaintiff has pled causes of action against defendant in his individual capacity. Plaintiff alleges that defendant acted out of personal animosity toward defendant and in direct contradiction to the written direction of his employer. (Complaint P30.) Although plaintiff recognizes that the issue to be determined is whether the complaint pleads facts showing conduct outside of defendant's official capacity, (Memorandum of Points and Authorities in Support of opposition to Motion to Dismiss ('Pl.'s Opp'n'.) at 7), plaintiff's complaint in this action is virtually unchanged from the complaint filed in *Corrinet v. United Nations*, which was dismissed on the ground that plaintiff had not pled facts showing individual capacity conduct. The new complaint contains two relevant changes. First, plaintiff alleges that Ginns is sued solely in his individual capacity, (complaint P4); the similar paragraph in the old complaint alleged that defendant was at all times working within the scope and course of his status as an official of the U.N. (*Corrinet v. United Nations Complaint, Schmidtberger Decl. Ex.* CP16.) Second, the new complaint alleges that 'when Ginns conducted himself in the above-stated defamatory matter *[sic]*, he did so out of personal animosity toward Corrinet, and in direct contradiction to the written direction of his employer, the United Nations. As such, Ginns conduct as alleged herein is outside the scope and course of that employment, and is conduct which Ginns is personally and individually liable for. (Complaint P30.)

> These minor alterations do not change the fact that plaintiff only alleges action undertaken while defendant wee acting as a U.N. official. See Complaint P22(A) (alleging that Associated Press reporter to whom defendant made allegedly defamatory statements was referred to defendant by the U.N.); Complaint P25 (alleging that defendant spoke to Associated Press reporter 'in his position as the United Nations designee to give a reference concerning Mr. Corrinet'). Plaintiff admits that the new complaint is 'quite literally a word processor result of the first action, with deletions of party defendant and claims made against other defendants in the previous action. ... As to Ginns, the claims have stayed exactly the same.' (P1's Opp'n at 12.) But plaintiff nonetheless argues that because of an alleged longstanding feud between plaintiff and defendant, defendant's actions were motivated by personal animosity toward defendant and were therefore undertaken in his individual capacity. Plaintiff's argument is unavailing.
>
> Assertions of bad faith or other improper motive have 'no bearing' on the court's determination of whether defendant is immune under the U.N. Convention and the IOIA. See *De Luca v. United Nations Organisation* 841 F. Supp. 531, 535 (S.D.N.Y.), aff'd, 41 F. 3d 1502 (2d Cir. 1994). In *Donald v. Orfila*, 252 U.S. App. D.C. 134, 788 F.2d 36 (D.C. Cir. 1986), the court explained that when the generative action in the case was related to defendant's official function, the plaintiff's assertions of bad motive did not convert that action into one undertaken in an individual capacity. See id. at 37. Here, plaintiff's complaint does no more than conclusorily allege that defendant acted in his individual capacity, based on plaintiff's belief that defendant acted out of ill will toward plaintiff. There is nothing in plaintiff's complaint or opposition brief that suggests that defendant took actions outside of his official capacity. That such official actions may have been motivated by animosity toward defendant *[sic]* is legally irrelevant.

It is implicit from this passage that the Federal District Court was prepared to permit the action to proceed had the facts disclosed a claim against the defendant in his personal capacity. That approach is no different than the one which commends itself to us; save that in the present case the facts are in serious dispute and require further investigation at trial.

The New Point

There is one other matter we find it necessary to allude to. We have dealt with this appeal on the basis that the 1949 Order is the applicable written law on the subject of the defendant's immunity. However, when responding to the appeal Datuk Lingham sought to argue that the 1949 Order is not extant and that there is no written law on the subject of the immunities and privileges of experts who are on mission on behalf of the United Nations. This is an argument not taken in the court below. No notice of it was given to Dr Das. We formed the view that the conditions on which a respondent may seek to

support the decision appealed against on grounds other than those set out in the written judgment of the judge at first instance had not been met. See, *Ho Kean v. Kong Lai Soo* [1974] 2 MLJ 63. Accordingly, we did not invite Dr Das to respond to this argument. For the same reason we decline to address it here. However, Datuk Lingham will no doubt be entitled to agitate the point at the trial of the action provided that it is properly taken in the pleadings.

The Result

For the reasons we have set out in this judgment, we are of the view that this appeal must fail. The orders made by the High Court are affirmed. In so far as costs are concerned, we agree with Dr Das that the order made by the judicial commissioner directing that costs be paid forthwith is an unusual order to make on the facts of this case. The order as to costs made by the High Court is therefore set aside. Those costs shall be in the cause. However, the costs of this appeal shall be taxed and be paid by the defendant to the plaintiffs. The deposit lodged in court by the defendant is hereby ordered to be paid out to the plaintiffs to account of their taxed costs.

Reported by WA Sharif